THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 2022-UP-085 (filed March 2, 2022)
Case No. 2014-CP-26-07790

Richard Ciampanella, ……..……..……...…….Respondent,

v.

City of Myrtle Beach, …….....…..……..…….…….....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner City of Myrtle Beach certifies the Petition for Rehearing was made and ruled upon by the Court of Appeals on April 21, 2022.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals misapprehend the distinction between negligence and gross negligence?

II. Did the Court of Appeals err in failing to distinguish testimony concerning the construction and/or design of a dune walkover from testimony concerning the maintenance and/or inspection of the walkover?

III. Did the Court of Appeals abuse its discretion in affirming the grant of a new trial when Respondent did not present evidence from which a jury could find the City of Myrtle Beach was grossly negligent in designing or constructing the dune walkover?

STATEMENT OF THE CASE

This gross negligence action arises out of a fall at a beach walkover in Myrtle Beach, South Carolina on August 19, 2014. In his Complaint, Richard Ciampanella ("Respondent") alleges he leaned against a railing on a dune walkover and the railing gave way, causing him to fall and sustain personal injuries.

Respondent filed this action against Petitioner City of Myrtle Beach ("the City") on November 20, 2014, alleging *inter alia* negligent construction, design, and maintenance of the walkover. The City filed a timely Answer denying liability and raising affirmative defenses. Specifically, the City asserted Respondent's claims were subject to the provisions of the South Carolina Tort Claims Act[1] ("SCTCA") and the South Carolina Recreational Use Statute[2] ("RUS").

This case proceeded to a jury trial before the Honorable Thomas Russo. The City moved for a directed verdict arguing: (1) pursuant to the RUS, Respondent was required to prove gross negligence, whereas the evidence showed the City exercised at least slight care; and (2) under the SCTCA, the City was immune from loss resulting from maintenance of public property used for recreational purposes unless the City failed to correct any defect within reasonable time after actual notice. The trial court granted the City's motion for directed verdict, finding a lack of evidence establishing actual notice as required by S.C. Code Ann. 15-78-60(16) of the SCTCA. The trial court further found Respondent's simple negligence claims were barred by the RUS. (R. p. 1; p.

[1] S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2011). The SCTCA provides a governmental entity is not liable for loss resulting from "maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security, or supervision within a reasonable time after actual notice of the defect or condition." § 15-78-60(16).

[2] S.C. Code Ann. §§ 27-3-10 to -70 (2007 & Supp. 2021).

415, lines 22-25; p. 419, line 6-p. 421, line 22; p. 424, lines 15-17; p. 425, line 8-p. 426, line 16; p. 428, line 19-p. 429, line 6; p. 432, lines 10-14).

Respondent subsequently filed a Motion for a New Trial and to Alter or Amend a Judgment. (R. p. 18). Following a hearing, the trial court granted Respondent a new trial in part only on the narrow issue of whether the walkover was designed and/or constructed in a grossly negligent manner. The trial court specifically denied Respondent's motion for a new trial as to any causes of action related to maintenance, security, or supervision of the walkover and reaffirmed its prior ruling that such claims are precluded by the SCTCA due to absence of evidence of actual notice. In addition, the trial court reaffirmed its prior ruling that the RUS applies and directing a verdict on all simply negligence claims pursuant to the RUS. Pertinently, the Order provided:

> The Court denies Plaintiff's motion for a new trial as to any causes of action related to maintenance, security, or supervision of the walkover, as such claims are precluded by the South Carolina Tort Claims Act. Nothing in this ruling conflicts with the Court's previous ruling during trial, whereby partial summary judgment as to simple negligence was granted pursuant to the South Carolina Recreational Use Statute.

(R. pp. 3-4). The trial court further clarified, "issues related to the City's inspection schedule, inspection methodology, and claims related to the adequacy of the City's preventative and corrective maintenance subsequent to original construction shall <u>not</u> be addressed during the new trial." (R. p. 4). Thus, only Respondent's claim that the walkover was designed or constructed in a grossly negligent manner survived.

After the trial court denied the City's Motion for Reconsideration, the City timely appealed. On appeal to the Court of Appeals, the City argued: 1) Respondent did not present evidence to establish a standard of care for design and construction in effect at the time of original construction;

and 2) Respondent did not present sufficient evidence to establish the walkover was designed or constructed in a grossly negligent manner.

Following briefing and oral argument, the Court of Appeals affirmed. See Ciampanella v. City of Myrtle Beach, Op. No. 2022-UP-085 (S.C. Ct. App. Filed March 2, 2022). The Court of Appeals found the trial court did not abuse its discretion in granting a new trial because Respondent presented sufficient evidence from which a jury could find the City designed and/or constructed the walkover in a grossly negligent manner.

The City filed a Petition for Rehearing, which was denied on April 21, 2022. This appeal follows.

STANDARD OF REVIEW

The grant or denial of a new trial motion rests within the discretion of the trial court and its decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Brinkley vs. S.C. Dept. of Corrections, 386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009); Norton v. Norfolk S. Ry., 350 S.C. 473, 567 S.E.2d 851 (2002). Even under an abuse of discretion standard, the appellate court can reverse an order granting or denying a new trial when the decision is without evidentiary support. S.C. State Highway Dep't. v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976).

ARGUMENT

I. The Court of Appeals misapprehended the distinction between negligence and gross negligence.

The narrow issue presented is whether Respondent submitted sufficient evidence for a jury to find the City was *grossly* negligent in designing or constructing the walkover.[3] Although the Court of Appeals used the term "gross negligence" and cited to gross negligence law, the Court of Appeals did not apply a gross negligence standard in its analysis.

"Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care." Clyburn v. Sumter Cty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). "Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Id. Gross negligence has been further defined as the lack of even slight care and diligence. Brooks v. Northwood Little League, Inc., 327 S.C. 400, 489 S.E. 2d 647 (Ct. App. 1997). "Gross negligence ordinarily is a mixed question of law and fact." Clyburn, 317 S.C. at 53, 451 S.E.2d at 887. "When the evidence supports but one reasonable inference, however, the question becomes a matter of law for the court." Id. at 53, 451 S.E.2d 887-88 (1994).

When the evidence supports one reasonable inference, the question of whether an activity constitutes gross negligence becomes a matter of law for the court. Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000). Accordingly, our courts have found summary judgment and directed verdict proper as to gross negligence claims in several

[3] Respondent did not appeal the circuit court's denial of his motion for a new trial on claims of negligent maintenance, security, or supervision of the walkover. Respondent likewise did not appeal the circuit court's partial grant of summary judgment to the City on his claims related to simple negligence. These unappealed rulings thus are law of the case. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

circumstances. See, e.g., Clyburn, 317 S.C. at 50, 451 S.E.2d at 885 (holding evidence of exercise of at least "slight care" precluded liability for gross negligence); Etheredge, 341 S.C. at 310, 534 S.E.2d at 277 (same); Pack v. Associated Marine Institutes, Inc., 362 S.C. 239, 246, 608 S.E.2d 134, 138 (Ct. App. 2004) (same); Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety, 337 S.C. 133, 140, 522 S.E.2d 605, 609 (Ct. App. 1999) (affirming summary judgment on gross negligence claim when evidence indicated at least a slight degree of care). The fact that more might have been done does not negate a finding that a defendant exercised at least slight care. See Etheredge, 341 S.C. at 312, 534 S.E.2d at 278 ("[T]he fact that the School District might have done more does not negate the fact that it exercised 'slight care.'"); Pack, 362 S.C. at 246, 608 S.E.2d at 138 ("The fact that more might have been done does not negate a finding that RMI employees exercised at least slight care.").

At trial, Respondent's theory of negligent design and construction centered on the fact the walkover railing was constructed using number 9 screws rather than lag bolts. Respondent presented expert testimony from Alan Campbell, P.E., a consulting engineer, to develop this theory. In opining the walkover railing should have been constructed with lag bolts, Campbell referenced a diagram of a walkover purportedly published by the South Carolina Department of Health and Environmental Control Office of Coastal Resource Management (OCRM) that depicted lag bolts as fasteners for a dune walkover railing. (R. p. 314, line 22-p. 315, line 18). However, Campbell acknowledged the diagram was not a mandate; it was a starting point, and the City could make modifications if it satisfied code requirements, industry standards, and construction guidelines, although those modifications would require more subsequent maintenance**.** (R. p. 294, line 1- p. 295, line 12; p. 375, lines 9-16).

In finding some evidence of gross negligence, the Court of Appeals relied on Campbell's

testimony that (1) the OCRM diagram recommended half-inch lag bolts rather than number 9 screws; (2) lag bolts were preferable because they did not erode as quickly as screws; and (3) "handrails must be designed to be able to withstand a concentrated load of 200 pounds," whereas Campbell opined Respondent would have exerted only 30 to 40 pounds of force when he leaned on the railing. This evidence, however, does not support a finding that the City failed to exercise slight care in designing and constructing the walkover. See Clyburn, 317 S.C. at 53, 451 S.E.2d at 887 ("Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care.").

In context, Campbell's testimony shows the City exercised at least slight care in *designing and constructing* the walkover.[4] As discussed more fully in section III, the OCRM diagram did not establish a requirement for using lag bolts. Although Campbell criticized the use of screws, he explained the galvanized coating on the screws would have protected them from corrosion for the first seven years, and the screws could have worked with a proper maintenance schedule. (R. p. 302, lines 11-18; p. 329, line 24-p. 331, line 5; p. 340, line 22-p. 341, line 1). Importantly, **Campbell agreed the walkover as constructed met the 200-pound load requirement he opined was required on the day it was constructed.** (R. p. 381, lines 3-25; p. 382, line 9-p. 383, line 7).

The construction of a walkover in a manner that would withstand the requisite force and using screws that would last at least seven years does not amount to *gross* negligence. Further, Campbell's opinion that the walkover could have been built better (with lag bolts instead of screws) is not evidence of *gross* negligence. See Etheredge v. Richland Sch. Dist. One, 341 S.C.

[4] As set forth more fully below, the Court of Appels also erred in not distinguishing between testimony regarding maintenance and/or construction and testimony regarding design and/or construction.

307, 310, 534 S.E.2d 275, 277 (2000) (holding fact school could have done more did not negate fact it exercised slight care in preventing violence).

As discussed more fully below, Respondent failed to submit evidence from which a jury could find the City *intentionally, consciously* failed to do something it should have done or did something *intentionally* that it should not have done. See Clyburn, 317 S.C. 50, 53, 451 S.E.2d 885, 887 ("Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do."). Respondent likewise did not submit evidence from which a jury could find the City failed to exercise slight care in *designing and constructing* the walkover. No evidence showed the City failed to do something it ought to do—Campbell testified the railing needed to withstand 200 pounds of concentrated force when constructed and he admitted the railing was in fact designed and constructed to meet this standard. In context, Campbell's testimony does not support a finding the City designed or constructed the walkover in a grossly negligent manner. Thus, although the Court of Appeals used the term gross negligence, it overlooked and/or misapprehended the distinction between gross negligence and simple negligence in its analysis and likewise erred in affirming the trial court's grant of a new trial.

II. The Court of Appeals erred in failing to distinguish evidence concerning the construction and/or design of the walkover and evidence concerning the maintenance and/or inspection of the walkover.

The Court of Appeals relied extensively on Campbell's testimony in erroneously finding evidence that the City failed to use slight care in constructing or designing the walkover. Specifically, the Court of Appeals found the following could support a finding the walkover was grossly negligently constructed or designed: (1) Campbell's opinion that the walkover did not comply with the International Property Maintenance Code ("Maintenance Code"); (2) Campbell's

opinion that "the City did not construct the walkover with the ability to withstand a 200 pound force" as required by the version of the building code Campbell claimed was applicable; and (3) Campbell's statement that corrosion on the screws showed an "absence of proper maintenance and absence of good construction." However, the crux of each and every one of Campbell's opinions came back to improper maintenance and inspection, *i.e.* the walkover as constructed with screws instead of lag bolts was sufficient when constructed but would require increased maintenance and inspection procedures as time progressed. The Court of Appeals' decision ignores the distinction between *construction and design* of the walkover and *maintenance and inspection* of the walkover. Viewed in context, the evidence does not support an inference that the walkover was *designed or constructed* in a grossly negligent manner.[5] See Jackson v. S.C. Dep't of Corr., 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989) ("A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing."); id. at 126-27, 390 S.E.2d at 468 ("Gross negligence involves a conscious failure to exercise due care.").

A. The Maintenance Code does not address construction or design.

The Court of Appeals' erroneous reliance on the Maintenance Code in reaching its decision directly conflicts with the trial court's unappealed ruling that the City is entitled to a directed verdict on all claims related to maintenance and/or inspection of the walkover pursuant to the SCTCA. The Maintenance Code is precisely what its name connotes, a *maintenance* code—not a

[5] The City recognizes the unique posture this case presents due to the trial court's unappealed ruling limiting the issues on retrial to whether the walkover was designed and/or constructed in a grossly negligent manner. This limitation is precisely why the Court must closely scrutinize Campbell's opinions to determine if they relate to construction/design or maintenance/inspection. When the rationale for Campbell's opinions is properly considered, at their core, all Campbell's opinions relate to the increased maintenance he opines accompanies the use of screws rather than lag bolts—that is the sole reason he takes issue with screws.

design or construction code. Campbell explained the Maintenance Code is "a document for, basically maintenance and repair because *the International Building Code is a design document* . . . . But [the Maintenance Code] is more addressed towards repair, maintenance, and to a certain extent, life safety . . . ." (R. p. 324, emphasis added). The Maintenance Code, when setting forth unsafe conditions that should be repaired or replaced, cites to the International Building Code and the International Existing Building Code as references for construction standards—further showing the Maintenance Code is not a building or construction code. See Section 301.1.1. In relying on Campbell's opinion's that the City did not comply with the Maintenance Code as some evidence of gross negligence, the Court of Appeals overlooked the fact that the narrow issue presented here is the design and construction of the walkover—not the maintenance or inspection of it. Accordingly, the Court of Appeals' decision is both unsupported by the evidence and controlled by an error of law.

B. Testimony about corrosion on the screws relates to the maintenance and inspection of the walkover rather than the construction or design of the walkover.

Campbell's opinion that corrosion on the screws showed "an absence of proper maintenance and absence of good construction" is not sufficient, when viewed in context, to support a finding that the City constructed or designed the walkover on a grossly negligent manner. As previously discussed, Campbell's opinions centered on the City's use of screws instead of lag bolts to construct the walkover, with Campbell's ultimate opinion being that the screws had corroded and were unable to withstand the requisite 200 lbs. of concentrated force at the time of Respondent's fall. What is critically important about Campbell's opinion is the underlying rationale that lag bolts are more appropriate than screws because lag bolts require less subsequent maintenance. The Court of Appeals ignored this crucial distinction.

During an *in camera* hearing, Campbell opined the railing ultimately failed because the screws were "so badly corroded, they could not carry any . . . sizable load." (R. p. 269, lines 1-25). When the jury returned, he explained the walkover "was damaged by corrosion over a long and extended period of time," and the City did not inspect or maintain it properly. (R. p. 362, lines 12-23). Importantly, Campbell testified the galvanized screws the City used "could have worked" **with more maintenance**. (R. p. 317, line 14-p. 318, line 2, p. 375, lines 2-19). Campbell's testimony further established the primary issue that led to the corrosion was the City's maintenance schedule, which Campbell classified as inadequate. (R. p. 332, line 19-p. 335, line 7, p. 357, line 1-p. p. 358, line 16).

The following exchange reveals Campbell's ultimate opinion concerning the use of screws versus lag bolts:

> Q: …But the use of 10 or 12 wood screws, that's an appropriate application; do you agree or not?
> A: In some circumstances, it could be.
> Q: I'm talking about 77th Avenue North. If the City used sixe #10—number 9, 10, or 12 screws, is that an appropriate size screw for that application?
> A: As long as—yes, as long as they inspect and maintain it properly, which they absolutely did not.

(R. p. 375, lines 9-16).

In context, Campbell's testimony establishes screws could in fact be used to construct a walkover to what he opined was the requisite standard, but would require more maintenance and inspection than lag bolts. Campbell's testimony concerning the corrosion of the screws does not provide any evidentiary support for a finding that the walkover was constructed or designed in a grossly negligent manner. Instead, such testimony bears on maintenance and inspection—the types of acts and omissions from which the City has immunity under the SCTCA. Accordingly,

the Court of Appeals' ruling not only lacks evidentiary support, but is also controlled by an error of law and should be reversed.

C. The Court of Appeals' finding that Campbell opined "the City did not construct the walkover with the ability to withstand a 200 pound force" relies on evidence related to maintenance rather than evidence related to design or construction.

Similarly, in finding "Campbell opined the City did not construct the walkover with the ability to withstand a 200 pound force," the Court of Appeals conflated testimony about construction with testimony about maintenance and overlooked the numerous instances where Campbell admitted the walkover, as constructed, *did* meet the 200-pound load requirement.[6]

Campbell's initial testimony on direct examination opining that the railing was not constructed to withstand 200 pounds of concentrated force with based on his mistaken belief as to the number of screws utilized. Once Campbell considered the actual number of fasteners, he testified repeatedly that the original construction would satisfy the 200-pound requirement. After conducting calculations, Campbell admitted a railing constructed using three screws and two boards (as this walkover was constructed) would meet the 200-pound concentrated force requirement. (R. pp. 376-81). He further acknowledged the additional nails depicted in a photograph of the railing would provide additional strength to the structure, and the screws working together could have withstood up to 400 pounds of concentrated force. (R. pp. 382-83). Campbell agreed that "with all these nails," the railing could "withstand way more than 200 pounds of concentrated pressure" on the day it was built. (R. p. 383). He likewise agreed that in terms of construction, the railing had sufficient strength at the time it was constructed. (R. p. 384, lines 5-

[6] When Campbell opined the railing "absolutely did not" have the ability to withstand a 200-pound limit, he was specifically asked about its load capacity on August 19, 2014, the date of Respondent's fall, not at the time of construction. (R. pp. 335-336).

11). Assuming industry standards or codes required the walkover to withstand 200 pounds, Campbell's testimony in context does not support negligence—much less *gross* negligence—as to the design and construction of the walkover.

Additionally, in relying on Campbell's testimony that Respondent would have exerted a 30-to-40-pound load when he leaned on the railing, the Court of Appeals misapprehended and/or overlooked the distinction between the railing's load capacity at the time it was constructed and its load capacity on the day Respondent visited the walkover—potentially more than twenty years after the walkover was built. Any testimony regarding the load the railing could withstand on the day Respondent visited the walkover goes to whether the City properly maintained the walkover rather than whether the City properly designed and constructed the walkover. Although Campbell's testimony could arguably support a finding of gross negligence as to the City's *maintenance* of the walkover, his testimony does not establish the City was grossly negligent in using screws rather than lag bolts to construct the walkover.

III. The Court of Appeals erred in finding the trial court did not abuse its discretion in granting a new trial because Respondent did not present evidence from which a jury could find the City was grossly negligent in designing or constructing the walkover.

To prove negligence, a plaintiff must show (1) the defendant owed a duty of care to plaintiff; (2) the defendant breached that duty by a negligent act or omission; and (3) the plaintiff suffered damage proximately caused by the breach of duty. Nelson v Piggy Wiggly, Inc., 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010).

Viewed in the light most favorable to Respondent, Respondent did not present evidence showing (1) the City breached any standard of care in designing or constructing the walkover or (2) the standard of care of constructing or designing a walkover that existed when the walkover was built. Without such evidence, the trial court abused its discretion in granting Respondent a

new trial on the issue of whether the walkover was designed or constructed in a grossly negligent manner, and the Court of Appeals erred in affirming.

A. No evidence established the City breached any standard of care in designing and/or constructing the walkover.

Campbell ultimately acknowledged the City's use of screws rather than lag bolts was appropriate if the walkover was properly maintained and the screws used by the City "could have worked" with proper maintenance. This testimony, coupled with testimony that the galvanized screws would have lasted at least seven years before beginning to corrode, supports an inference that the walkover was in fact properly designed and constructed—thus precludes a finding of gross negligence.

Campbell's testimony that lag bolts would have lasted longer than screws did not establish a duty for the City to conform to the design Campbell suggested was "best" and would require less maintenance. See Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 392-93, 701 S.E.2d 776, 781-82 (Ct. App. 2010) (finding expert's testimony regarding his preference for the design of a parking lot did not create a duty to conform to that design in the absence of a requirement of law, ordinance, or industry safety standard). Rather, Campbell's testimony established that the walkover was designed and constructed in an acceptable manner. The focus of Campbell's opinions continually came back to maintenance; he conceded the screws would be appropriate if the walkover was properly maintained. Looking strictly at evidence related to design and construction, Campbell's testimony established only that the City could have constructed the walkover in a manner that would require less maintenance; his testimony did not establish that the design and construction of the walkover reflected a failure to exercise slight care.

Campbell's testimony also established that the walkover railing could in fact withstand a concentrated load of 200 pounds at the time it was constructed. Because the narrow issue is

whether the City was *grossly* negligent in designing or constructing the walkover, the Court of Appeals erred in focusing on the load the railing could withstand the day Respondent visited the walkover rather than at the time of construction. Because no evidence supports a finding that the City was grossly negligent in designing and constructing the walkover, the circuit court abused its discretion in granting Respondent a new trial on this issue, and the Court of Appeals erred in affirming.

B. Respondent did not present evidence to establish a standard of care for the design or construction of the walkover at the time it was built.

Respondent failed to submit evidence showing the standard of care for constructing or designing a walkover that applied at the time the walkover was constructed. Campbell did not know when the walkover was constructed and relied on a City employee's best guess that the walkover was built after Hurricane Hugo, sometime around 1990. (R. p. 373, line 18-p. 374, line 1). Without more, his opinions about construction and design standards at the time the walkover was constructed are based on guesswork and do not support a finding of negligence.

Even assuming the walkover was built in 1990, Campbell did not submit any evidence of the design or building codes in effect in 1990. As discussed above, Campbell relied on a diagram provided by OCRM to support his theory that the City should have used lag bolts instead of screws. However, Campbell acknowledged OCRM did not mandate the use of half-inch lag bolts, the diagram was just a starting point, and a person designing or constructing a walkover could "make modifications as long as they satisfy building code requirements, industry standards[,] and construction guidelines." (R. p. 294, line 1- p. 295, line 12; p. 375, lines 9-16). Thus, the OCRM diagram did not set forth a requirement for lag bolts and cannot support gross negligence.

Likewise, the Maintenance Code (from 2012) did not establish a standard of care for construction or design that requires using lag bolts rather than screws. In fact, Campbell admitted

the Maintenance Code "is more addressed towards repair, maintenance, and to a certain extent, life safety." Although Section 304-12 of the Maintenance Code section requires handrails to be firmly fastened, it offers no guidance on the type of fastener that should be used or on the design and construction of railings. A 2012 maintenance code has no bearing on the standard for design and construction in 1990.

Finally, Campbell relied on the 1994 Standard Building Code and 2000 International Building Code. (R. p. 337, line 19-p. 338, line 10; pp. 681-84; pp. 685-87). However, these codes do not address the type of fastener that must be used on railings or require the use of lag bots rather than screws, nor where the in existence at the "best guess" time of construction in 1990.[7] Thus, assuming Campbell's testimony that the building codes have not changed much since at least 1980 is accurate, Campbell still did not set forth a code, regulation, or ordinance that requires or even recommends the use of lag bolts rather than screws. Campbell did not rely on anything other than a diagram—which he acknowledged was a recommendation rather than a requirement—and his own preference for using lag bolts rather than screws. See Nelson, 390 S.C. at 392-93, 701 S.E.2d at 781-82 (finding expert's testimony regarding his preference for the design of a parking lot did not create a duty to conform to that design in the absence of a requirement of any law, ordinance, or industry safety standard). In the absence of a code or generally accepted industry standard supporting the use of lag bolts, Campbell's testimony establishes nothing more than his personal preference. Such testimony provides no evidence of the applicable standard of care at the alleged time of construction in 1990 and the Court of Appeals abused its discretion in relying on Campbell's personal preference to affirm the grant of a new trial.

[7] As noted in the City's briefing in the Court of Appeals, these codes or standards were all established after the walkover was purportedly built.

CONCLUSION

For the foregoing reasons, the City respectfully request the Court reverse the decision of the Court of Appeals, which affirmed the Circuit Court's Order granting Respondent a new trial.

Respectfully submitted,

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